Jerry Ngiam Swee Beng v Abdul Rahman bin Mohd Rashid & Anor and other actions

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP PETITION NO D1–28–850 OF 2000 AND ORIGINATING SUMMONS NO D1-24-186 OF 2001 CONSOLIDATED WITH ORIGINATING SUMMONS NO D4-24-119 OF 2001
VINCENT NG J
27 JUNE 2003

Companies and Corporations — *Directors — Removal — Suspension — Whether board has power to suspend director — Whether court has power to suspend director*

Companies and Corporations — *Meetings — Notice — Contravention of notice of meeting — Whether notice of meeting mandatory — Whether notice null and void — Whether defect curable — Whether argument of prejudice caused relevant — Justice of the case — Onus to establish no substantial injustice will be caused — Companies Act 1965 s 355*

Companies and Corporations — *Winding up — Appointment of special manager — Application to appoint special manager — Whether application must be supported by affidavit — Application supported by report of liquidator only — Whether sufficient — Companies (Winding Up) Rules 1972 r 39(1)*

Companies and Corporations — *Winding up — Liquidators — Officers of the court — Whether leave needed to commence action against them — Companies Act 1965 ss 277, 229 and 232*

Jerry Ngiam Swee Beng ('Jerry Ngiam') and Abdul Rahman Mohamed Rashid ('Abdul Rahman') were both registered quantity surveyors and the only directors and shareholders in Jurukur Bina Sdn Bhd ('Jurukur'), Abdul Rahman holding 60% of the shares while Jerry Ngiam held the remaining 40%. Following Abdul Rahman's stroke in 1993, much of the day-to-day management and administration of Jurukur was handled by Jerry Ngiam. Sometime in early 1995, Jerry Ngiam set up another company in the same field, as a prelude to the taking-over of Jurukur. The setting up this other company was used by Abdul Rahman to, firstly, shut out and, eventually, oust Jerry Ngiam from Jurukur. Much of Jerry Ngiam's administrative powers were transferred to Wan Amin Azharie bin Mahmood ('Wan Amin'). As a result of the complete breakdown in relations between Jerry Ngiam and Abdul Rahman, there was a deadlock in the administration and management of Jurukur. Jerry Ngiam presented this petition to wind up Jurukur. An order in terms therof was granted and Anthony Joseph Skelchy ('Skelchy') was appointed liquidator of Jurukur. Skelchy appointed Jerry Ngiam as special manager of Jurukur. Abdul Rahman successfully secured a stay of the winding order and once more took over the administration and management of Jurukur. Abdul Rahman purported to convene Jurukur's Board of Directors' Meetings on 17, 20 and 26 April and 3 May where Wan

Amin was appointed an additional director, Faisal bin Abdullah Rahman ('Faisal') was appointed the company secretary and Jerry Ngiam was suspended as a director. However the Registrar of Companies declined to register the appointment of Wan Amin as an additional director. Jerry Ngiam took out an originating summons in respect of Abdul Rahman's actions after the stay order. Jerry Ngiam sought to nullify Jurukur's purported Board of Directors' Meetings held on 17 and 20 April and 3 May and the resolutions passed thereat and to maintain the status quo of the Board of Directors. Abdul Rahman also took out an originating summons seeking to validate any irregularities in Jurukur's Board of Directors' Meetings as complained of in Jerry Ngiam's action. He also filed applications in the present winding up action for the court to take cognizance of Skelchy's performance of his duties as liquidator. Skelchy had appointed Kenneth Gomes as solicitor to assist him. This same Kenneth Gomes had acted for Jerry Ngiam in the winding up proceedings. Abdul Rahman thus argued that Skelchy was clearly biased and was not acting independently. Skelchy, whilst denying Abdul Rahman's allegations, sought to have this application dismissed on the sole ground that Abdul Rahman had failed to obtain leave of court before proceeding against him. Abdul Rahman also sought to set aside the order appointing Jerry Ngiam as the special manager of Jurukur, on the grounds that the order of appointment was purportedly granted on the application of Jerry Ngiam himself and that the application, by way of a summons in chambers, was supported by a report and not an affidavit. By consent, the two originating summonses were consolidated and all four applications were heard on the same day.

Held, dismissing all the applications:

(1) Abdul Rahman, being a contributory, had only two avenues open to him. However he had not secured the necessary leave of the court to proceed against the liquidator under s 277(2) of the Companies Act 1965 ('the Act') (see p 458G–H); *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 followed. Alternatively, Abdul Rahman could proceed against the liquidator, through the Official Receiver ('OR'), under s 229 read in conjunction with s 232(1). The OR was entrusted with the duty of inquiring into complaints regarding a liquidator's performance. The OR could conduct an inquiry or direct an investigation of the liquidator. It was only after such an inquiry or investigation and, where the OR thought fit, that the OR would apply to the court to examine the said liquidator to take cognizance of his conduct. A court should not embark on an inquiry of its officer unless there is substantial material before the court to suggest that it would be in the public interest to do so. Thus, Abdul Rahman's failure to proceed against the liquidator, through the OR, was fatal. (See p 458E–H).

(2) Rule 39(1) of the Companies (Winding Up) Rules 1972 provides that an application by a liquidator for the appointment of a special manager is to be supported by his report. Where such a report is filed instead of an affidavit, the report must be treated for the purpose of the hearing as if it were an affidavit. A perusal of the application and the report clearly show that the application made by Skelchy and not Jerry Ngiam. Although this was not borne out by the fair order, it was an oversight, both by the solicitors who drew up the order and by the court which approved the same. This mistake could, and should, be rectified without prejudice to any of the parties. (See p 459D–E, G).

(3) The court is not clothed with the power to suspend a director. The Companies Act 1965 does not make provision for the suspension of directors but for their removal and disqualification in certain circumstances. A suspension would give 'holidays' to directors with respect to their statutory functions and duties under the Act (see Loh Siew Cheong's *Power to Suspend Directors: A New Corporate Weapon of the Majority* [1999] 3 MLJ xxxiii) (see p 462F–G).

(4) The validity of all that transpired at the meetings depended on whether proper notice of those meetings had been served. Notice should be given in the proper manner. Notice of the meeting should be served on the director concerned accordingly to the Articles of Association. Where, as here, the Memorandum of Association was silent on the issue, the court had to examine the previous practice in calling directors meetings (see p 464C, H); *Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312 followed. No proper or reasonable notice of the three directors meetings was served on Jerry Ngiam and the meetings were therefore null and void. The notice sent by fax to Jerry Ngiam at 4.16pm a day before the meeting could not constitute reasonable or normal notice see p 468C–D); *First Nominee (Pte) Ltd v New Kok Ann Realty Sdn Bhd* [1983] MLJ 76 followed.

(5) Section 355 of the Act provides that no proceedings were to be invalidated by any defect irregularity or deficiency of notice or time unless the court is of the opinion that substantial injustice has been or may be caused. Thus, before making any such order the court must satisfy itself that such an order would not do injustice. The exercise of the discretion implied a consideration of the relative gains and losses of the parties involved. Prejudice is not the criterion, justice is and that justice may require that prejudice to one party, if the order were made, be balanced against the respective prejudice to other parties if the order were not made (see pp 460I–461C); *Re Australian Continental Resources Ltd* 1974–1976 ACRL 405–430 followed. The onus was on those seeking to have the meeting validated to establish that substantial injustice would not result to the company or to any member or creditor thereof. Clearly, Jerry Ngiam's interests were prejudiced

by the outcome of the three directors meetings, and, once the court validated the meetings, the effect would be to oust Jerry Ngiam from the board of Jurukur. There would be substantial injustice to Jerry Ngiam (see pp 461E–F, 464A–B); *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314 followed.

(6) To allow Jerry Ngiam's application would, on similar grounds, cause substantial injustice to Abdul Rahman. Indeed, in view of the dismissal of Abdul Rahman's application, a large part of Jerry Ngiam's application becomes academic. The position adopted by the courts in this convoluted area of company law has always been one of reluctance to interfere in the internal affairs and management of the company. More so, taking into account that the dispute in the winding up proceedings is presently the subject of two appeals in the Court of Appeal. The petition for winding up is grounded, inter alia, on 'the just and equitable' basis. In view of the differences between these two protagonists, perhaps the only just and equitable solution would be to wind up the company. It would be oppressive and prejudicial to allow one application whilst dismissing the other (see p 469A–D).

[Bahasa Malaysia summary

Jerry Ngiam Swee Beng ('Jerry Ngiam') dan Abdul Rahman Mohamed Rashid ('Abdul Rahman') masing-masing jurukur bahan berdaftar dan juga pengarah serta pemegang saham tunggal Jurukur Bina Sdn Bhd ('Jurukur'), Abdul Rahman memegang 60% saham dan Jerry Ngiam memegang 40% bakinya. Setelah Abdul Rahman mengalami strok pada tahun 1993, kebanyakan pengurusan harian dan pentadbiran Jurukur dikendalikan oleh Jerry Ngiam. Pada awal tahun 1995, Jerry Ngiam telah menubuhkan suatu syarikat baru dalam bidang yang sama, sebagai langkah pendahuluan kepada mengambil alih Jurukur. Penubuhan syarikat baru ini telah digunakan oleh Abdul Rahman bagi, sebagai langkah awal, mengenepikan dan, seterusnya, membuang Jerry Ngiam dari Jurukur. Kebanyakan dari kuasa pentadbiran Jerry Ngiamtelah dipindahkan kepada Wan Amin Azharie bin Mahmood ('Wan Amin'). Akibat kemerosotan perhubungan antara Jerry Ngiam dan Abdul Rahman, pentadbiran dan pengurusan Jurukur menghadapi suatu jalan buntu. Jerry Ngiam telah menyerahkan petisyen ini untuk penggulungan Jurukur. Suatu perintah seperti dipohon telah diberikan dan Anthony Joseph Skelchy ('Skelchy') telah dilantik penyelesai Jurukur. Skelchy telah melantik Jerry Ngiam as pengurus khas of Jurukur. Abdul Rahman telah berrjaya mendapatkan pengantungan perintah penggulungan dan sekali lagi mengambil alih pentadbiran dan pengurusan Jurukur. Abdul Rahman mendakwa telah memanggil suatu mesyuarat lembaga pengarah Jurukur pada 17, 20 dan 26 April dan 3 Mei di mana Wan Amin telah dilantik pengarah tampahan, Faisal bin Abdullah Rahman ('Faisal') telah dilantik setiausaha syarikat dan Jerry Ngiam telah

digantung khidmatnya sebagai pengarah. Walau bagaimanapun, Pendaftar Syarikat enggan mendaftarkan perlantikan Wan Amin sebagai pengarah tambahan. Jerry Ngiam telah mengeluarkan suatu saman pemula berkenaan tindakan yang diambil oleh Abdul Rahman setelah perintah penggantungan diberikan. Jerry Ngiam memohon agar mesyuarat-mesyuarat lembaga pengarah Jurukur yang diadakan pada held on 17 dan 20 April dan 3 Mei dan resolusi yang diluluskan diketepikan dan status quo lembaga pengarah dikekalkan. Abdul Rahman juga telah mengeluarkan saman pemula memohon agar sebarang ketidakrataan mesyuarat lembaga pengarah Jurukur yang diadukan dalam tindakan Jerry Ngiam diesahkan. Ia juga telah memfailkan permohonan dalam tindakan petisyen penggulungan ini memohon agar mahkamah mengambil kesedaran ke atas tingkah-laku Skelchy dalam khidmatnya sebagai penyelesai. Skelchy telah melantik Kenneth Gomes sebagai peguamcara bagi membantunya . Kenneth Gomes ini telah berkhidmat sebagai peguamcara Jerry Ngiam dalam petisyen penggulungan ini. Maka Abdul Rahman berhujah bahawa Skelchy jelas bercenderung dan tidak bertindak secara tidak berkecuali. Skelchy, sambil menafikan dakwaan Abdul Rahman itu, memohon agar permohonan itu ditolak semata-mata atas alasan bahawa Abdul Rahman teah gagal mendapatkan izin mahkamah terlebih dahulu sebelum memulakan tindakan terhadapnya. Abdul Rahman juga telah memohon mengenepikan perintah perlantikan Jerry Ngiam sebagai pengurus khas Jurukur, di atas alasan bahawa perintah perlantikan tersebut kononnya diberikan di atas permohonan Jerry Ngiam sendiri dan permohonan tersebut di buat, secara saman dalam kamar, disokong oleh suatu lapuran dan bukannya afidavit. Secara persetujuan, kedua-dua saman pemula telah digabungkan dan kesemua empat permohonan dibicarakan pada hari yang sama.

Diputuskan, menolak kesemua permohonan:

(1) Abdul Rahman, sebagai seorang pemegang saham, hanya ada dua jalan terbuka kepadanya. Walau bagaimanapun, ia gagal mendapatkan izin mahkamah terlebih dahulu sebelum membawa tindakan terhadap penyelesai di bawah s 277(2) Akta Syarikat 1965 ('Akta tersebut') (lihat ms 458G–H); *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 diikut. Sebaliknya, Abdul Rahman boleh membawa tindakan terhadap penyelesai, menerusi pegawai penerima ('PP'), di bawah s 229 dibaca bersama dengan s 232(1). Pegawai penerima diamanahkan dengan tugas menyelidik aduan terhadap prestasi seseorang penyelesai. Pegawai penerima boleh membuat siasatan atau mengarahkan suatu siasatan terhadap penyelesai tersebut. Hanya setelah penyelidikan atau siasatan itu dibuat dan, di mana PP berpendapat wajar, PP dapat memohon kepada mahkamah untuk memeriksa penyelesai supaya mengambil kesedaran berkaitan tingkah-lakunya. Mahkamah tidak harus memulakan suatu penyelidikan pegawainya sendiri melainkan terdapat keterangan

yang wajar dihadapan mahakamah mencadangkan bahawa adalah dalam kepentingan awam berbuat demikian. Kegagalan Abdul Rahman bertindak terhadap penyelesai, menerusi PP, membawa padah. (Lihat ms 458E–G).

(2) Kaedah 39(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 memperuntukkan bahawa sesuatu permohonan oleh seseorang penyelesai bagi perlantikan sebagai pengurus khas hendaklah disokong oleh lapurannya. Di mana sesuatu lapuaran difailkan sebagai ganti sesuatu afidavit, lapuran tersebut hendaklah dianggap bagi maksud perbicaraan tersebut sebagai afidavit. Suatu pembacaan teliti permohonan dan lapuran jelas menunjukkan bahawa permohonan tersebut dibuat oleh Skelchy dan bukannya Jerry Ngiam. Walaupun telah dinyatakan sebaliknya dalam perintah yang dimeteraikan, ini adalah suatu kesilapan, oleh peguamcara yang menyediakan perintah tersebut mahupun oleh mahkamah yang telah meluluskannya. Kesilapan ini dapat, dan harus, dibetulkan tanpa sebarang prejudis kepada mana-mana pihak (lihat ms 459D–E, H).

(3) Mahkamah tidak diberi kuasa mengantungkan seseorang pengarah. Akta Syarikat tidak membuat peruntukan bagi penggantungan pengarah, hanya bagi penyinkiran dan disqualifikasi dalam keadaan tertentu. Suatu penggantungan akan memberikan 'holidays' kepada pengarah terlibat berkaitan tanggungjawab dan tugas statutori mereka di bawah Akta tersebut (lihat Loh Siew Cheong, *Power to Suspend Directors: A New Corporate Weapon of the Majority* [1999] 3 MLJ xxxiii) (lihat ms 462F–G).

(4) Keesahan segala yang telah berjalankan akibat mesyuarat tersebut bergantung kepada samada notis yang wajar bagi mesyuarat tersebut telah diserahkan. Notis hendaklah diberikan dalam cara berpatutan. Notis mesyuarat tersebut hendaklah diserahkan ke atas pengarah yang terlibat selaras dengan Artikel Persekutuan. Sekiranya, seperti disini, Memorandum Persekutuan tidak menyentuh isu ini, maka mahkamah harus meneliti praktis sebelumnya dalam memanggil mesyuarat pengarah (lihat ms 464C, H); *Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312 diikut. Tiada sebarang notis wajar dan munasabah berkaitan three mesyuarat pengarah itu telah diserahkan ke atas Jerry Ngiam, maka mesyuarat itu adalah tidak sah dan terbatal. Notis yang dihantar fax kepada Jerry Ngiam pada jam 4.16 petang sehari sebelum mesyuarat tersebut tidak dapat dianggap notis wajar dan munasabah (lihat ms 468C–D); *First Nominee (Pte) Ltd v New Kok Ann Realty Sdn Bhd* [1983] MLJ 76 diikut.

(5) Seksyen 355 Akta tersebut memperuntukkan bahawa tiada prosiding harus ditaksahkan oleh sebarang kecacatan, ketidakrataan atau kekurangan notis atau masa melainkan mahkamah berpendapat bahawa ketidakadilan telah atau

mungkin disebabkan. Jadi sebelum membuat sebarang perintah sebegitu mahkamah harus berpuas hati bahawa perintah tersebut tidak akan mambawa ketidakadilan. Penjggunaan budi bicara tersebut membawa implikasi penimbangan nisbah untung dan rugi pihak-pihak yang terlibat. Prejudis bukannya kriteria, keadilan adalah kriteria dan keadilan mungkin memerlukan bahawa prejudis kepada salah sau pihak, sekiranya perintah tersebut diberikan, ditimbangkan dengan prejudis kepada pihak lain sekiranya perintah tersebut tidak diberikan (lihat ms 460I–461C); *Re Australian Continental Resources Ltd* 1974–1976 ACRL 405–430 diikut. Beban adalah ke atas pihak yang memohon supaya mesyuarat diesahkan membuktikan bahawa ketidakadilan tidak akan diakibat kepada syarikat mahupun mana-mana ahli atau pemiutangnya. Adalah jelas kepentingan Jerry Ngiam diprejudiskan oleh keputusan yang diambil dalam tiga mesyuarat pengarah tersebut, dan, sekiranya mahkamah mengesahkan mesyuarat tersebut, kesannya adalah pembuangan Jerry Ngiam dari lembaga pengarah Jurukur. Memang wujudnya ketidakadilan kepada Jerry Ngiam (lihat ms 461E–F, 464A–B); *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314 diikut.

(6) Sekiranya permohonan Jerry Ngiam dibenarkan, ia akan menghasilkan, di atas alasan yang sama, ketidakadilan kepada Abdul Rahman. Sememangnya, dengan penolakan permohonan Abdul Rahman, sebahagian besar permohonan Jerry Ngiam tidak perlu dibahaskan lagi. Kedudukan yang diambil mahkamah dalam perkara perundangan syarikat yang rumit ini adalah keseganan campur tangan dalam urusan dalaman dan pengurusan sesebuah syarikat. Apatah lagi memandangkan pertikaian dalam prosiding penggulungan syarikat ini adalah didedahkan dalam dua rayuan dihadapan Mahkamah Rayuan. Petisyen bagi penggulungan berasaskan, antara lain, judul 'just and equitable'. Memandangkan perselisihan antara kedua-dua pihak ini, mungkin satu-satunya penyelesaian yang adil dan saksama adalah bagi syarikat tersebut digulungkan. Adalah menjadi tidak adil dan berprejudis sekiranya satu permohonan dibenarkan semasa yang satu lagi ditolak (lihat ms 469A–D).]

Notes

For cases on the appointment of special managers, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 877.

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1056–1087.

For cases on notice of meetings, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 406–415.

For cases on the removal of directors, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 289–301.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)
Australian Continental Resources Ltd, Re 1974–1976 ACRL 405–430 (folld)
Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204 (folld)
Dr Mahesan & Ors v Ponnusamy & Ors [1994] 3 MLJ 312 (folld)
First Nominee (Pte) Ltd v New Kok Ann Realty Sdn Bhd [1983] MLJ 76 (folld)
Goodwealth Trading Pte Ltd, Re [1991] 2 MLJ 314 (folld)
Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors [1992] 2 MLJ 10 (refd)
Lloyd-Owen v Bull [1936] 4 DLR 433 (refd)
Perdana Merchant Bankers Bhd, Re [1997] 3 MLJ 435 (refd)
TN Metal Industries Sdn Bhd v Ng Pyak Yeow & Ors [1996] 4 MLJ 567 (refd)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709 (refd)

Legislation referred to

Companies Act 1965 ss 229, 232(1), 236(1), 277(1), (2), 279, 355(3), 392(2)
Companies (Winding Up) Rules 1972 r 39(1)

Kenneth Gomes (*Sabarudin Othman & Ho*) for petitioner and liquidator in D1–28–850–2000, first defendant in D1–24–186–2001 and plaintiff in D4–24–119–2001.

Prasad Abraham (*Patricia Paul* with him) (*Prasad Abraham & Assoc*) for first respondent in D1–28–850–2000, plaintiff in D1–24–186–2001 and first defendant in D4–24–119–2001.

Vincent Ng J:

Preamble

Briefly, the applications pending before me are:

(i) enclosure 43 in D1(D9)–28–850–00 ('the first suit') — En Abdul Rahman bin Mohamed Rashid's ('Abdul Rahman') application for the court to take cognizance of the conduct of the liquidator in the performance of his duties;

(ii) enclosure 54 in the first suit — Abdul Rahman's application to set aside the order dated 8 March 2001;

(iii) enclosure 1 in D4–24–119–01 ('the second suit') — Mr Jerry Ngiam Swee Beng's ('Jerry Ngiam') application for a series of declaration in respect of Jurukur Bina Sdn Bhd's ('Jurukur') Board of Directors' Meetings held on 17 and 20 April 2001 respectively, Jurukur's Extraordinary General meeting held on 3 May 2001, resolutions

passed by the said board and to maintain the status quo of the Board of Directors; and

(iv) enclosure 1 in D1–24–186–01 ('the third suit') — Abdul Rahman's application to validate any irregularities in Jurukur's Annual General Meetings held on 17, 20 and 24 April 2001 respectively.

Background facts

In order to properly adjudicate upon the various applications before me, it is necessary to review the colourful history of these proceedings in some detail.

Jerry Ngiam and Abdul Rahman are both registered quantity surveyors and were sole directors cum shareholders in Jurukur. Abdul Rahman had 60% shareholding with the remaining 40% being held by Jerry Ngiam. Following Abdul Rahman's stroke in 1993, much of the day to day management and administration of Jurukur was handled by Jerry Ngiam.

Sometime in early 1995, Jerry Ngiam set up JASA Ukur Bina, another company in the same field as a prelude to the taking-over of Jurukur. Unfortunately, the setting up of JASA Ukur Bina was used by Abdul Rahman to firstly shut out and eventually oust Jerry Ngiam from Jurukur. Much of Jerry Ngiam's administrative powers were transferred to En Wan Amin Azharie bin Mahmood. As a result of the complete breakdown in relations between Jerry Ngiam and Abdul Rahman, there was a deadlock in the administration and management of Jurukur.

For these reasons, Jerry Ngiam presented a petition to wind up Jurukur on 4 October 2000. Order in terms was granted on 5 February 2001 and Mr Anthony Joseph Skelchy ('Skelchy') was appointed liquidator of Jurukur. During his brief tenure, Skelchy, with leave of court, appointed Jerry Ngiam as special manager to assist him in running Jurukur on 8 March 2001. Abdul Rahman successfully secured a stay of the winding order on 6 April 2001 and once more took over the administration and management of Jurukur.

Soon after, on 27 April 2001, Jerry Ngiam took out the second suit in respect of Abdul Rahman's actions after the stay order. Abdul Rahman commenced the third suit on 9 July 2001, seeking to validate the same actions and also filed encls 43 and 54 on 24 November 2001 and 11 June 2002 respectively.

It is noteworthy that despite two of the suits being filed at different intervals, they were transferred to Commercial 1. The first suit was assigned to Commercial 1 sometime in June 2001 when Commercial 9 was closed. Upon the application of Jerry Ngiam, a consent order was recorded on 12 June 2002 to consolidate the second and third suits respectively. In order to expedite the hearing of all four applications, the applications were all fixed for hearing on the same day.

Enclosure 43

Abdul Rahman's application was made under s 277(2) of the Companies Act 1965 ('the Act') which provides that:

> ... the Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirement or the requirements of the Court or if any complaint is made to the Court by any creditor or contributory or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.

Abdul Rahman maintained that Skelchy acted in contravention of s 236(1) of the Act by appointing Kenneth Gomes as solicitor to assist him in the performance of his duties. This is due to the fact that Kenneth Gomes acted for Jerry Ngiam in the winding up proceedings against Jurukur. Further, Abdul Rahman alleged that by causing Jerry Ngiam himself to be appointed as the special manager of Jurukur, Skelchy was clearly biased and was not acting independently. Abdul Rahman raised questions as to Skelchy's management of Jurukur's trust account and the fact that upon the stay of the winding up order, Skelchy unilaterally handed over the company's assets, records and documents to Jerry Ngiam, instead of the duly constituted board of directors.

Skelchy, whilst denying all of Abdul Rahman's allegations, sought to have the application dismissed on the sole ground that Abdul Rahman failed to obtain leave of court before proceeding against him under s 277(2) of the Act and cited the case of *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 (CA) as authority.

On this question, I am completely ad idem with Abu Mansor JCA, who delivered the judgment of the Court of Appeal. He held that:

> *... it is clear that a liquidator having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him. ...*
>
> While we agree that the applicant may proceed against the liquidator, we are, however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding up judge before proceeding against the liquidator and not, as was done here, proceed independently to prevent unnecessary and wastefully litigation. The approach the learned judge should take is as given in the Privy Council case of *Lloyd-Owen v Bull* ... he has to obtain authority from a judge below who will act liberally but must satisfy himself as to the probable success of this application and he has to give an assurance to the sanctioning judge that his action is not vexatious or merely oppressive. The court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like. *Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs.* (Emphasis added.)

(See *Lloyd-Owen v Bull* [1936] 4 DLR 433, *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709, *TN Metal Industries Sdn Bhd v Ng Pyak Yeow & Ors* [1996] 4 MLJ 567 and *Re Perdana Merchant Bankers Bhd* [1997] 3 MLJ 435.)

Consideration was also had of sub-s (3) of the same provision in the Act which is as follows:

> The Registrar or the Official Receiver may report to the Court any matter which in his opinion is a misfeasance, neglect or omission on the part of the

liquidator and the Court may order the liquidator to make good any loss which the estate of the company has sustained thereby and make such other order as it thinks fit. A

And, ss 229 and 232 of the Act are expressed thus:

229 Control of unofficial liquidators by Official Receiver

(1) Where in the winding up of a company by the Court a person other than the Official Receiver is the liquidator the Official Receiver shall take cognizance of his conduct and if the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by any written law or otherwise with respect to the performance of his duties, or if any complaint is made to the Official Receiver by any creditor or contributory in regard thereto, the Official Receiver shall inquire into the matter, and take such action thereon as he may think expedient. B C

(2) The Official Receiver may at any time require any such liquidator of a company which is being wound up by the Court to answer any inquiry in relation to any winding up in which he is engaged, and may, if the Official Receiver thinks fit, apply to the Court to examine him or any other person on oath concerning the winding up. D

(3) The Official Receiver may also direct a local investigation to be made of the books and vouchers of such liquidator.

232 General provisions as to liquidators

(1) A liquidator appointed by the Court may resign or on cause shown be removed by the Court. E

(2) A provisional liquidator other than the Official Receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined by the Court.

Reading s 232 together with s 229 of the Act, it is clear that the official receiver ('the OR') is entrusted with the duty of inquiring into any complaints in respect of the liquidator's performance. In exercise of this duty, the OR may conduct an inquiry and is also empowered to direct an investigation of the books of the liquidator. It is only after completion of an inquiry and investigation and if the OR thinks fit, does the OR apply to the court to examine the said liquidator concerning the winding up; to take cognizance of his conduct. F G

And rightly so, because I am of the opinion that a court should not embark on an inquiry of its officer unless there are substantial material before the court to suggest that it would be in the public interest to do so.

Thus, it is clear that in the instant cast, Abdul Rahman, being a contributory, has only two avenues open to him to move against the company, namely either by invoking s 277(2) or s 229 read in conjunction with s 232(1). It is now settled that the court's leave is required to proceed under s 277(1). Unfortunately, Abdul Rahman has neither secured the necessary leave from the court nor sought to proceed against the liquidator through the OR. This is fatal to his cause in encl 43. H

After much ado, all this court is left with is a scenario of a bitterly contested winding up proceedings and a liquidator barely two months into his tenure, opposing an application for his removal whilst carrying on his I

usual duties of preparing the necessary reports under the winding up rules. This, without more, I find to be insufficient to move this court to take cognizance of Skelchy's conduct.

For the reasons set out above, I dismiss Abdul Rahman's application in encl 43 with costs.

Enclosure 54

Abdul Rahman sought to set aside the order dated 8 March 2001, appointing Jerry Ngiam as the Special Manager of Jurukur.

Abdul Rahman's objections to the appointment were two-fold:

(i) the order dated 8 March 2001 (encl 34) reads that the appointment was granted on the application of Jerry Ngiam himself; and

(ii) the application, via a summons in chambers, was supported by a report and not an affidavit.

Firstly, a perusal of the application and the accompanying report (encl 30) clearly set out that the application was at the behest of Skelchy and not Jerry Ngiam. Although this was not borne out by the fair order, it was an oversight, by both the solicitors drawing up the order and the court approving the same. This mistake can and should be rectified without prejudice to any of the parties.

Secondly, r 39(1) of the Companies (Winding Up) Rules 1972 provides for an application by the liquidator for the appointment of a special manager to be supported by his report.

Further support can be found in para 2839 *Halsbury's Law of England* Vol 7(3) (4th Ed, 1996):

> Use of reports. A report maybe filed in court instead of an affidavit:
>
> (1) in any case, by the official receiver, whether or not he is acting in any capacity mentioned below, or a deputy official receiver; or
>
> (2) unless the application involves other parties or the court otherwise orders, by the administrator, a liquidator, a provisional liquidator, or a special manager.
>
> *In any case where a report is filed instead of an affidavit, the report must be treated for the purpose of any hearing before the court as if it were an affidavit. ...* (Emphasis added.)

As both the objections were devoid of any merit, I have no difficulty dismissing the application in encl 54 with costs.

Before moving on to consider the other pending applications, consideration should be had of s 279 of the Act, which provides the proper mode for addressing any grievances caused by the liquidator.

Enclosures 1 in the second and third suits

Jerry Ngiam filed the second suit seeking a series of declarations to nullify inter alia meetings of the Board of Directors, Directors, EGM of Jurukur

held on 17, 20 April and 3 May 2001 and resolutions passed therein and for the Registrar of Companies to maintain the status quo of Jurukur's Board of Directors. He sought for the following declarations:

(a) A declaration that the Board of Directors Meeting of the second defendant company held on 17 April 2001 and on 20 April 2001 and all other purported Board of Directors Meetings in which there was no proper quorum, and all proceedings therein are unlawful and any or all resolutions or any orders passed or any decisions made therein are unlawful, null and void and of no effect.

(b) A declaration that the purported coming Extraordinary General Meeting of the second defendant be held on 3 May 2001 is improperly convened, unlawful, null and void.

(c) A declaration that all subsequent meetings of the directors and the resolutions approved thereafter from the Directors Meeting on 17 April 2001 are similarly invalid, null and void and of no effect.

(d) A declaration that the status quo of the second defendant's Board of Directors and Shareholders be maintained and the plaintiff be at liberty to apply for rectification of the Register of Directors with the Registrar of Companies.

(e) A declaration that the appointment of En Faisal bin Abdullah Rahman as the Company Secretary to the second defendant contrary to the holding of any Directors Meeting and without Board Resolution is unlawful, null and void and of no effect.

Abdul Rahman on the other hand filed the third suit pursuant to s 355(3) of the Act, seeking to validate all the meetings and resolutions and for an order directing the Registrar of Companies to accept the Form 49, confirming the appointment of En Wan Amin Azarie as an additional director of Jurukur. This was what he prayed for:

(i) the meetings of the Board of Directors of the second defendant held on 17 April 2001, 20 April 2001 and 26 April 2001 and the resolutions passed therein be declared as valid and proper;

(ii) the Registrar of Companies be directed to accept the filing of Form 49 confirming the appointment of En Wan Amin Azharie bin Mahmood as the additional director of the second defendant;

(iii) such further and/or other relief that this Honourable Court deems fit and proper to award; and

(iv) parties be at liberty to apply.

Both sides made serious allegations and accusations of one trying to oust the other out of Jurukur and run the company exclusively without the consent or knowledge of the other and essentially causing the deadlock in the management.

Section 355 of the Act sets out that:

(1) No proceedings under this Act shall be invalidated by any defect irregularity or deficiency of notice or time *unless the Court is of the opinion*

A *that substantial injustice has been or may be caused thereby which can not be remedied by any order of the Court.*

(2) Without affecting the generality of sub-s (1) and sub-s (2) or any of the other provisions of this Act, *where any omission, defect, error or irregularity* (including the absence of a quorum at any meeting of the company or of the directors) has occurred ... the Court —

B (a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify ...

(b) *shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof*; ... (Emphasis added.)

C I am guided by *Re Australian Continental Resources Ltd* 1974–1976 ACRL 405–430 wherein the court held that:

> ... the exercise of the discretion ... implies a consideration of the relative gains and losses of the parties involved. Prejudice is not the criterion, justice is and that justice may require that prejudice to one party if the order were made, be balanced against the respective prejudice to other parties if the order were not
D made.

(See *First Nominee (Pte) Ltd v New Kok Ann Realty Sdn Bhd & Anor* [1983] MLJ 76, *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314, *Nyuk Fong & Ors v Pan Global Equties Sdn Bhd* [1991] 1 MLJ 152, *Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312 and *AK Ming Sdn Bhd v Chang Ching*
E *Chuen* [1995] MLJ 772.)

In respect of Abdul Rahman's application (encl 1) for validation in the third suit No D1–24–186–01, my rationcination is as follows:

The onus is on those seeking to have the Directors Meetings validated to establish that a substantial injustice would not result to the other
F directors of shareholders. Under s 355 of the Act, the court is given power to make a range of orders of a remedial kind but all are subject to a finding of the fact that:

(1) no substantial injustice has been caused or is likely to be caused to any person by the making of the order including that of any member or
G creditor and even the company itself;

(2) that the irregularity is essentially procedural (steps in the calling of a Director's Meeting is essentially procedural); and

(3) that the order is in the interest of the company.

H Therefore, the court would have to come to a finding of fact, on the above-mentioned three grounds or relevant criteria specific in s 355 of the Act before giving the order sought which is not remedial but a validation.

The *Butterworths Commentary of Australian Cases* on s 1322 of what is the meaning of 'substantial injustice' is of assistance:

I > Substantial injustice likely to occur. For an example of a court finding that a substantial injustice is likely to occur see *Donrob Enterprises Pty Ltd v Queensland Petroleum Management Ltd* (1988) 14 ACLR 307; 7 ACLC 255 where the court held that a meeting held without a quorum of members was

invalid. In *Bell Resources Ltd v Turnbridge Pty Ltd (No 2)* (1988) 13 ACLR 762; 6 ACLC 970 it was held that insufficient notice of resolutions to reduce the number of directors of the company was a substantial injustice and the voting on the resolutions was declared void. The whole meeting could not be held to be invalid, as notice of the meeting itself had been properly given. See also *Mamouney v Soliman* (1992) 9 ACSR 63; 10 ACLC 398 in which a special resolution to alter a company's articles as held to be invalid under s 1322 as the failure of the company to notify a shareholder of the meeting was in the circumstances an irregularity causing substantial injustice. In *Australian Innovation Ltd v Petrovsky* (1996) 21 ACSR 218, 14 ACLC 1357 Lockhart J invalidated an extraordinary general meeting convened by a company director on the basis that the explanatory note accompanying the notice of the meeting contained several misleading or potentially misleading statements, both the notice and the form of proxy gave an address for the return of proxies not in accordance with the company's articles and, finally, the actions of the company directors in convening the meeting were not bona fide in the interests of the company as whole and constituted a breach of his duty of care and diligence under s 232(4).

Substantive not procedural irregularity. In *Hedges v NSW Harness Racing Club Ltd* (1991) 5 ACSR 291; 9 ACLC 1025, the court held that an irregularity in the election of directors, which had resulted in the wrong person being declared elected, could not be cured under s 1322(2) since it was a substantive and not a procedural irregularity.

The plaintiff (Abdul Rahman), in his originating summons, sought to move this court to validate all the resolutions whether they are legal or not without any exception, namely:

Resolution — 17th April 2001

(a) Confirm En Wan Amin as a Director as soon as he obtains the registration with the Board of Quantity Surveyor.

(b) Suspension of the Directorship of Mr Jerry Ngiam with immediate effect.

In my judgment, this court is not clothed with powers to suspend a director. The Companies Act 1965 does not make provision for the suspension of directors but for their removal and disqualification in certain circumstances. A suspension would give 'holidays' to directors with respect to their statutory functions and duties under the Act (see *Power to Suspend Directors: A new corporate weapon of the majority* by Loh Siew Cheong reported in [1999] 3 MLJ xxxiii).

In *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314, it reads:

One of two directors of a company petitioned to have the company wound up on the ground that it was just and equitable to do so. The company's restaurant business had ceased and the petitioner's relationship with the only other director and shareholder had deteriorated to such a state that they were no longer talking to each other. The other shareholder opposed the petition and at a board meeting of the company, which was attended only by the opposing shareholder, solicitors were appointed to represent the company. The company then, through its solicitors, filed a motion to strike out the petition.

Held, dismissing that motion and allowing the petition.

(1) The appointment of the company's solicitors was irregular, and this irregularity could not be cured by s 392 of the Companies Act. The section is applicable to save proceedings at a meeting where the lack of a quorum is of little or no consequence, and no shareholder's interests are prejudiced by any decision taken at the meeting. The provision would not be applicable in the case where it would result in disputed decisions being taken by one of two shareholder groups in a company to the exclusion and possible disadvantage of the remaining shareholder. The appointment of the company's solicitors was therefore invalid. The firm of solicitors had no locus standi to further attend the proceedings and were excused.

(2) The company had ceased to carry on its restaurant business, and consequently the substratum of the company had disappeared. A company's substratum was the main object which it was formed to achieve. If it was no longer able to carry out its main object, its substratum was gone and any member may petition for a winding-up order on the just and equitable ground.

(3) The fact that the majority of shareholders may wish to keep the company in existence, and to exercise the powers to carry on a different kind of business, or even a similar business, will not prevent a dissenting shareholder from petitioning for a winding up order. This would be so even if the company's memorandum specifically provided that each of its objects should be a principal object, because a court must determine the real object for which the company was formed, and would allow a winding up petition if the object had to all intents and purposes been abandoned.

(4) In a situation as in the instant (that) case where the company's substratum had disappeared, and there was opposition by the two shareholder groups to continuing in business with the other, it was clearly just and equitable that the company be wound up, so that the case assets could be distributed and each of the two groups could go his own way.

I agree with counsel for Jerry Ngiam that the decision in *Re Goodwealth* is on all fours with the present case. There is only two directors and shareholders in Jurukur Bina Sdn Bhd and both the directors are not on talking terms. The company's substratum to provide professional quantity surveying services, has gone, and it is no longer able to carry out its main objects. There is a winding up order in this case and it was wound up on the just and equitable basis. The judge in *Re Goodwealth* refused to apply s 392(2) of the Act, and said, in p 317:

> Apart from the section, no authority was cited to me in support of this contention. In my opinion, on a proper construction, s 392(2) is limited in scope. An irregularity is not cured if 'the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any of the Court.' Thus, the provision is clearly applicable to save the proceedings at a meeting where the lack of a quorum is of little or no consequence, and no shareholder's interests are prejudiced by any decision taken at the meeting. But the provision equally cannot be applicable in a case such as this, in which it will result in disputed decisions being taken by one of only two shareholder groups in a company to the exclusion and possible disadvantage of the remaining shareholder. In my judgment, therefore the

board meeting on 25 October 1989 and the proceedings of the meeting were invalid. Having come to this view, I ruled that the appointment of PK Wong and Advani was also invalid.

Therefore very clearly, in my judgment, Jerry Ngiam's interests were prejudiced by the outcome of the three Directors Meetings, and once the court validates the meetings the effect would be to oust Jerry Ngiam from the board of the second defendant. There will therefore be no doubt, substantial injustice to Jerry Ngiam. The provisions cannot be applicable where the disputed meetings results in decisions being taken that will disadvantage the rights of Jerry Ngiam who is a director and shareholder of the second defendant.

Jerry Ngiam's second point is that it is clear that the validity of all that transpired at the meting held on 17 April 2001, 20 April 2001 and 26 April 2001 depends on whether proper notice of that meeting had been served on him. There is no dispute that there are only two directors. Notice should be given in the proper manner. He contends that the Notices covering the above-mentioned Directors Meetings were defective for being void or insufficient notices, and accordingly the meetings were ineffective and the resolution passed thereat were invalid unless saved by a validation order.

A director or a company secretary could summon a meeting of the Board of Directors, by notice served upon the first defendant. See arts 93, 94, 95 and 97 of the Articles of Association of the second defendant which states as follows:

> 93 The Directors may meet together for the despatch of business adjourn and otherwise regulate their meetings as they think fit and may determine the quorum necessary for the transaction of business. Until otherwise determines two Directors shall form a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the Chairman shall have a second or casting vote.
>
> 94 A Director may at any time and the Secretary upon the request of a Director shall convene a meeting of the Directors.
>
> 95 A resolution in writing signed by a majority of the Directors for the time being or their alternates not being less than two Directors shall be as valid and effectual as if it had been passed by a meeting of Directors duly called and constituted. Any such resolution may consist of several documents in like form each signed by one or more directors.
>
> 97 A meeting of the directors for the time being at which a quorum is present shall be competent to exercise all or any of the authorities powers and discretion by or under the articles of the company for the time being vested in or exercisable by the directors generally.

Notice of the meeting should be served on the director concerned accordingly to the Articles of Association. However, if the Memorandum of Article is silent on the issue (as in the instant case), the court has to examine the previous practice in calling Directors Meetings.

In *Dr Mahesan & Ors v Ponnusamy & Ors*, a case which has been approved by the Court of Appeal, Zakaria Yatim J, held:

A (1) Where the memorandum and articles specify the duration of the notice of directors' meetings, the rule must be strictly complied with. However, where, as in this case, the court has to examine the previous practice in calling directors' meetings. In this case, five days was sufficient notice for the meeting.

B On p 318:

> Mr CK Ong, counsel for the defendants submitted that on the question of the notice of the board meeting dated 14th April 1994, the court had to decide: (a) whether the notice was given to the plaintiffs; (b) if the notice was given to the plaintiffs, whether it provided sufficient time for the plaintiffs to attend the meeting; (c) whether the notice provided details as to the nature of the
> C business to be transacted; and (d) whether a written agenda is necessary in law to be given to the directors. He too cited a number of authorities.
>
> I shall now examine the position in law whether the plaintiffs were given insufficient time to attend the board meeting on 25 April 1994. The memorandum and articles of the company are silent on the issue of notice of meeting of directors. The Companies Act 1965, too is silent on this point. It
> D is therefore necessary to examine the position at common law. According to RR Pennington, *Company Law* (6th Ed) at p 575:
>
> > 'Notice of board meetings should be given to all the directors in sufficient time to enable them to attend. What is sufficient notice depends on the facts at the time ...'

E On p 320:

> From the cases cited above, it is clear that where a few hours' notice is given for a board meeting and two of the directors are not able to attend the meeting due to the short notice, or where no notice is given because the director is abroad, a meeting held pursuant to the notice is void. But if the directors who receive the short notice of meeting make no objections to the short notice or
> F meeting make no objections to the short notice or make no request that the meeting be adjourned to another date, such meeting is valid. Where the notice of meeting does not reach the directors because they are abroad, the meeting is only an irregularity, which can be set right at any moment. In order to determine whether sufficient notice is given to directors, the court has to examine the previous practice of the board of directors in calling the meeting.
> G In *Homer*'s case (1888) 39 CH D 546, the few hours notice has never been previously given in the history of the company.
>
> Where the memorandum and articles expressly specify the duration of the notice of meeting of the board of directors, the board must strictly comply with that rule. Non-compliance with that rule will render the meeting ineffective and the resolutions passed at the meeting invalid. See *First Nominee*
> H *(Pte) Ltd v New Kok Ann Realty Sdn Bhd & Anor* [1983] 2 MLJ 76.

Jerry Ngiam further contends that this is not a case where insufficient notice of a meeting was given but it is a case where no notice whatsoever was given. He has categorically stated in para 53, he stated that he did not receive any notice of that meeting dated 17 April 2001 nor for the meeting to be held
I on 20 April 2001. Although a notice was faxed to his office on 16 April 2001 at 4.16pm, he contends that that was not a reasonable notice and that all three meetings are related to each other and are therefore invalid. And, it is

not a case of a mere irregularity but of a nullity, considering his contention that no notice whatsoever was given. The notice as per the agenda prays for:

(i) confirmation of a new Director (first meeting);

(ii) suspension or removal of Jerry Ngiam as a director (first meeting);

(iii) confirmation of the minutes (second meeting);

(iv) withdrawal of signatory right to first defendant (third meeting);

(v) only two signatures for bank accounts plaintiff and Wan Amin (third meeting).

Power is given to validate such irregularities. However, if this is not a case of an irregularity but of a nullity, s 355 looks to the justice of a particular case, it is not concerned with the question of whether prejudice would result. Since the meetings are void, there is no irregularity to be cured.

The decision of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 772 is illuminating, and which I would adopt in the instant case:

> (3) Unless the articles of a company provide to the contrary, a meeting of a board of directors is not valid unless reasonable notice of it and the relevant agenda that is to be discussed is given to the directors. In this case, no notice of the meeting was given. It was thus a nullity and all the business conducted was utterly void. It could not be considered a mere irregularity which could be cured because at the date of the meeting, the plaintiffs not only had a majority of voting power on the board but also on the floor of any general meeting that might have been convened.
>
> (5) As the business conducted at the subsequent meetings of the company's board were dependent for their validity upon the propriety of the meeting which had failed to stand up to curial scrutiny, those later meetings were also void.

On p 801:

> I now turn to consider the more formidable argument that the defendants' failure to give notice did not have the effect of invalidating the board meeting. In support of her argument, Cik Kannaperan cited two decisions, namely, *Bently Stevens v Jones* [1974] 2 All ER 653; [1974] 1 WLR 638, and *Dr Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312.

On p 804:

> How can it ever be said that a director's removal at a meeting of which notice to him is withheld is a mere irregularity? When the question is put in this way, it seems clear to me that the proposition contended for falls so short of our own standards and concepts of corporate fairness, that I find it entirely unacceptable. However, I am relieved to realize that I need not place myself on a collision course with Lindley LJ, since all that one needs to do is to recognize that relief to Browne was principally denied at an interlocutory level on the ground that his conduct amounted to an acquiescence of the wrong done to him.
>
> I take the proposition to be well settled that, unless the articles of a company provide to the contrary, no meeting of a board is valid, unless

A reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors. *Young v Ladies Imperial Club Ltd* [1920] 2 KB 523; [1920] All ER Rep 223 is authority for that proposition. In that case, it was held that, 'where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting, and accordingly the omission B to summon one member of a committee and the fact that the notice did not state the object of the meeting with sufficient particularity vitiated the proceedings of that body.

On p 806:

Given the finding of fact by the learned judge that the notice convening the C meeting of 17 April 1990 was not served on the plaintiffs — a finding that I accept as being entirely proper — and having regard to the true principle of law that is to be applied, I am satisfied that the conclusion reached by the learned judge, namely, that the meeting and all the business conducted thereat were utterly void, is correct. It follows that the submission by counsel on this point is unacceptable. The business conducted at the subsequent meetings of the first defendant's board are dependent for their validity upon D the propriety of the meeting of 17 April 1990. That meeting having failed to stand up to curial scrutiny, these later meetings are also void and useless, and the learned judge was right in so holding.

On p 810:

Now it is clear that the section looks to the justice of a particular case: it is not E concerned with the question whether prejudice would result in the making of a validation order. (See *Re Australian Continental Resources Ltd* (1975) 1 ACLR 405.) Where the justice of the instant case lay and how discretion should be exercised is a matter eminently within the province of the learned judge. For it must not be forgotten that the section vests the original discretion in the High Court and that the initial function of this court is one of review F only. An appellant therefore must therefore demonstrate that a judge has committed one or more of those errors which permits the Court of Appeal to exercise a discretion of its own. Having regard to the findings of fact the judge made, and having regard to the way in which he approached the determination as to where the justice of the case lay, I am convinced that the defendants have failed to discharge this onus.

G Also see *Nyuk Fong & Ors v Pan Global Equities Sdn Bhd* [1991] 1 MLJ 152.

In *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10 at p 12, Edgar Joseph J (as he was then) made the following observations, in potent language, on a member's right to vote:

H The right to vote is one of a member's fundamental rights. Excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote was not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression of the minority, which vitiated and therefore rendered null and void the AGM and all resolutions passed thereat. In the circumstances, there could be no recourse to the validation provisions of either s 355(12) or s 355(3) of the Act. The word I 'proceedings' in s 355(1) of the Act should not be confined solely to legal proceedings but should extend to all proceedings at company meetings provided that they are required to be held under the Act.

And, in his judgment (at p 33) he further said: A

> However, in respect of any omission, defect or irregularity in the management or administration of a company in contravention of the Companies Act 1965 s 355(3) therefore is manifestly clear and empowers the court, in certain circumstances, on its own motion or on application, to make a validation order provided no injustice is done to the company or to any member or creditor thereof. The next question which arises is whether wrongfully excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote conferred under s 148(1) of the Companies Act 1965 was a mere omission, error or an irregularity capable of being cured under s 355(1) or s 355(3) (see *Nyuk Fung & Ors v Pan Global Equities Bhd* where the principles for the applicability of s 355(3) are discussed). In my view, excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote was not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression on the minority which vitiated and therefore rendered null and void the AGM and all resolutions passed thereat. B C

In the present case before me, I am satisfied that no proper or reasonable notice of the three Directors Meetings had been served on Jerry Ngiam and they were therefore null and void, I would further hold that the notice sent by fax to Jerry Ngiam at 4.16pm on 16 April 2001 (a day before 17 April meeting) could not constitute reasonable or normal notice. D

Thus, I would hold that to allow validation at this stage would certainly do grave and substantial injustice to Jerry Ngiam and the second defendant. E

In *First Nominee (Pte) Ltd v New Kok Ann Realty Sdn Bhd & Anor* [1983] 2 MLJ 76 at p 78, it was held:

> In *Re Australia Continental Resources Ltd*, it has been said that the exercise of discretion provided in s 366(3) (Australian), implies a consideration of the relative gains or losses of the parties involved. Prejudice is not the criterion, justice is, and that justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made. F

The affidavits have substantially gone into the background of this matter. The parties are exclusively partners in the business, albeit Abdul Rahman is infirmed. It is not denied that Abdul Rahman has ousted Jerry Ngiam from the business. He has attempted to bring in a new director, Wan Amin, who was originally not a partner to this business. Wan Amin for all practical purposes has now taken over the business. Looking at the background, you cannot say that a majority of the partners has been used to further oust Jerry Ngiam as a director of the company. Further, this validation is only an afterthought. The Registrar of Companies pursuant to the earlier AGM or EGM has rejected Abdul Rahman's attempts to push through the earlier motions passed, hence one of the prayers of the plaintiff is for the ROC to accept the appointment of En Wan Amin. G H

Similarly, Jerry Ngiam, vide encl 1 in D4–24–119–01, sought to achieve the same end, the control over Jurukur, through some variation of the unfair and unconscionable methods that he himself had complained against Abdul I

Rahman. In my judgment to allow this encl 1 would, on similar grounds as advanced by Jerry Ngiam above, and bearing in mind the principles enunciated by the authorities above, cause substantial injustice to Abdul Rahman. Indeed, in view of the dismissal of Abdul Rahman's application in the third suit a large part of Jerry Ngiam's application in D4–24–119–01 has become academic.

The position adopted by the courts in this convoluted area of company law has always been one of reluctance to interfere in the internal affairs and management of the company. More so, taking into account that the considerable dispute in the winding up proceedings is presently subject to two pending appeals in the Court of Appeal, the decision whereof would finally put to rest the current fight between these two protagonists. One of the petition for winding up is grounded on 'the just and equitable' basis. In view of the evidently and eminently irreconcilable, profound and violent differences between these two protagonists, perhaps the only just and equitable solution would be to wind-up the company.

In light of all above circumstances, I find that it would be oppressive and prejudicial to allow one application whilst dismissing the other. I therefore dismiss both Jerry Ngiam's and Abdul Rahman's applications in the second and third suit respectively, with costs.

All applications dismissed.

Reported by Sivapragasam Kumaran